1988

State of Utah v. David J. Hunt : Brief of Appellant

Utah Supreme Court

David Wilkinson; Attorney General; Dan Larsen; Assistant Attorney General.
Randine Salerno; Attorney for Appellant.

IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent. **vs.** **DAVID J. HUNT,** Defendant-Appellant.	APPEAL NO: 880386-CA NUMBER: 13

BRIEF OF APPELLANT

PETITION FOR WRIT OF CERTIORARI FROM A DECISION RENDERED BY THE UTAH COURT OF APPEALS

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IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent. **vs.** **DAVID J. HUNT,** Defendant-Appellant.	**PETITION FOR WRIT OF CERTIORARI** CASE NO:

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court erred in denying Appellant's Motion To Suppress because the County Attorney failed to properly authorize or apply for a Telecommunications Intercept Order and whether the Order was void on its face because it authorized interception for a period of time in excess of that permitted by The Act.

2. Whether the June 27th Application was fatal as a result of the absence of any indication that the Deputy County Attorney was specifically designated by the County Attorney to make the Application.

3. Whether evidence obtained pursuant to the Telecommunications Orders should have been suppressed.

4. Whether Appellant was denied his right to effective assistance of counsel.

OPINION OF THE COURT OF APPEALS

This case was appealed to the Utah Court of Appeals. On october 5, 1989, judge Davidson filed the opinion affirming the trial Court in all aspects. A copy of this opinion is attached to this Petition as "Addendum #1".

JURISDICTION

This Petition For Writ Of Certiorari is brought pursuant to the Rules of the Utah Supreme Court, Rule 42. The trial on this case was before the Weber County Second Judicial District Court, Judge David Roth presiding, on February 19, 1987. Appellant was convicted of a second degree felony. A Notice Of Appeal was filed but dismissed June 1, 1987 for failure to prosecute. Following a habeas Corpus action, Appellant was resentenced and filed a new Notice Of Appeal on June 6, 1988. He was subsequently released on a Certificate of Probable Cause pending Appeal. The Court of Appeals affirmed his conviction on October 5, 1989. An Order was signed by Justice Orme, Utah Court of Appeals, continuing Appellant's Certificate pending a decision on Appellant's Petition. Prior to the expiration of the thirty (30) day period an Ex Parte Motion for Extension of Time was made and a corresponding Order was signed by the Supreme Court extending the time for filing this Petition For Writ Of Certiorari for

an additional thirty (30) days. The date of entry of the Order extending time is October 17, 1989. Jurisdiction is conferred on this Court pursuant Rule 43 (4) of the Utah Rules of the Supreme Court, in that the Court of Appeals has decided an important question of state law which has not been, but should be, settled by this Court. Therefore, a Petition For A Writ Of Certiorari is proper.

CONTROLLING PROVISIONS OF STATUTES

1. Utah Code Annotated §77-23a-1 through 16. Set out in its entirety in Appellant's "Addendum #2.

2. United States Constitution, 6th Amendment:

> In all criminal prosecutions, the accused shall enjoy the right....to have the assistance of counsel for his defense.

3. Utah Constitution; Article 1, Section 12:

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel...

STATEMENT OF THE CASE

The Appellant appealed a bench verdict finding him guilty of possession of cocaine with intent to distribute for value. The trial Court denied Appellant's Motion to Suppress on the grounds that the County Attorneys' failure to sign the telecommunication's intercept application was not fatal. Defense

counsel neglected to object to the Application for an extension of time during which to intercept phone messages on the grounds that the application was not made by a Deputy County Attorney specifically designated by the County Attorney to authorize such an application. This failure to object was plain error and deprived Appellant of his Constitutional right to effective assistance of counsel. The Utah Court of Appeals, on October 5, 1989, filed an opinion affirming the trial Court.

STATEMENT OF FACTS

On October 23, 1986, Judge Wahlquist of Ogden, Utah signed an Ex Parte Order authorizing the interception of telephonic communications to and from the telephone of Appellant, (Addendum #3 & T.T. @ Pg. 36). The Order purported to authorize interception of wire communications commencing on May 29, 1986, but not to exceed thirty days past June 28, 1986. This Order is based on an application that was Notarized but left unsigned by the Weber County Attorney.

On June 27, 1986, an application for an Ex Parte Order authorizing the extension of time was made by William F. Daines, Deputy County Attorney, Weber County, State of Utah, (Addendum #4). This application does not specify that Mr. Daines was a Deputy County Attorney specifically designated by the County

Attorney for purposes of §77-23a-8, Utah Code Annotated (1980), as that section existed at the time of this application. The Affidavit attached to the Order indicates that results thus far obtained from the first interception were unproductive as a result of the Appellant's absence from town during that period of time. All information contained in the Affidavit submitted by Mr. Daines and the police officer was obtained as a direct result of the Court's Order dated, but left unsigned, May 23, 1986. Subsequently, the Court granted a seven day extension of the telecommunications intercept.

Based upon information accumulated during the period of time which covered the Orders authorizing interception of wirecommunications to and from the Appellant's phone, police officers approached the Circuit Court Judge, Brent West, and secured a Search Warrant for the Appellant's automobiles. (T.T. @ pg. 27). On or about August 9, 1986, the Search Warrant was executed and, pursuant thereto, Appellant's house and vehicles were searched. Personal property and cocaine were seized as a result of the search. Appellant was subsequently arrested and charged with possession of cocaine with intent to distribute for value.

On February 19, 1987, the matter came on for trial before the Honorable David E. Roth, one of the Judges of the

Second Judicial District, sitting without a jury. Defense counsel realized that the initial authorization for the telephonic communication intercept had not been signed by the County Attorney until approximately two months after the Order had been signed by Judge Wahlquist, and pursuant to a Nunc Pro Tunc Order. (T.T. @ pgs. 36 & 40). A Deputy County Attorney then brought to the attention of the Court that no pre trial motion under Rule 12, Utah Rules of Criminal Procedure, had been filed with regards to the application. (T.T. @ pg 36). Defense counsel objected to the admission of any information pursuant to the Order on the grounds that the initial thirty days of the tap was simply inadmissible. He indicated that he did not know whether or not the Motion Nunc Pro Tunc would rectify something of this nature, i.e. whether or not it could validate Judge Wahlquist's Order if, in fact, signed two months after instituting said Order, but simply objected to the admissibility of any evidence pursuant to that Order. Defense counsel had filed a Motion to Suppress the day before the trial on the matter. He filed absolutely no suppression motions under the requirements of the Telephonic Interception Of Communications Act ten days prior to trial on the matter.

When trial on the matter commenced, defense counsel had

no authority for his position that the initial wire tap Order was ineffective as a result of the County Attorney's failure to sign same. (T.T. @ pg 38). He had not researched the issue even though he had a copy of the Order for some time prior to trial. The State, on the other hand, argued to the Court that they had a plethoria of cases that indicated that it was okay if the County Attorney did not sign the Application. Defense counsel had no authority nor did defense counsel object to the admissibility of any evidence obtained pursuant to the second warrant authorized and applied for by William Daines, Deputy County Attorney.

Judge Roth denied the Defendant's Motion finding that the failure to timely sign the Application was not fatal to the warrant. (T.T. @ pg 41). The trial Judge made no finding as to whether or not Mr. Daines was a duly authorized Deputy County Attorney specifically designated by the County Attorney to make an Application for a wire tap interception order. Subsequently, the Defendant was convicted of possession of cocaine with intent to distribute for value. The Defendant was sentenced to the Utah State Prison for an indeterminate amount of time of one to fifteen years. Defense counsel filed a Notice of Appeal on behalf of the Defendant, but failed to proceed with the Appeal. The

Appeal was dismissed June 1, 1987, and returned to the District Court for failure to prosecute. Following a Habeas Corpus action in Third District Court, the matter was remanded back to Judge Roth for resentencing in order to permit Appellant the opportunity to exercise his constitutional and statutory right to Appeal. His Notice Of Appeal was subsequently filed June 6, 1988, and Appellant was released from the Utah State Prison following Judge Roth's approval of a certificate of probable cause. Appellant thus far has spent more than fourteen months in the Utah State Prison. The Utah Court of Appeals affirmed the Defendant's conviction on October 5, 1989. The opinion is attached hereto and incorporated herein by reference. The Appellant was granted a thirty day extension of time during which to file his Petition For Writ Of Certiorari. The Utah Court of Appeals stayed remitture in this matter pending the Supreme Courts determination of the Appellant's Petition For Writ. The Order is attached hereto and incorporated herein by reference.

SUMMARY OF ARGUMENT

The trial Court errored in denying Appellant's Motion To Suppress All Evidence seized pursuant to the Search Warrant executed August 9, 1986. The County Attorney's failure to properly apply for a wire tap Order made said Order defective on

its face, even in light of the Nunc Pro Tunc Order entered two months after the fact. The initial application for Wire Tap Order was not executed properly and the subsequent application for an extension of that Order had not been authorized by a Deputy County Attorney "specifically designated" by the County Attorney to make said applications. Finally, Appellant was denied his right to effective assistance of counsel when his trial attorney failed to adequately represent the issues surrounding the telecommunications interceptions during the trial on the matter and by failing to properly file a Motion To Suppress evidence seized pursuant to a Telecommunications Order under the Telecommunications Act requiring that said Motion be made at least ten days prior to trial and articulating that the reasons made for said Motion were the fact that the Deputy County Attorney was not duly authorized by the County Attorney to make said application within the four corners of the document presented to the Court.

ARGUMENT

POINT ONE

THE WEBER COUNTY ATTORNEY FAILED TO PROPERLY AUTHORIZE THE ORIGINAL APPLICATION FOR AN ORDER PERMITTING INTERCEPTION OF APPELLANT'S WIRE AND ORAL COMMUNICATIONS IN VIOLATION OF §77-23a-8, U.C.A. (1980). FURTHER, THE ORDER PURPORTED TO AUTHORIZE INTERCEPTION FOR A PERIOD

OF TIME IN EXCESS OF THAT SUBMITTED BY THE ACT, VOIDING THE ORDER.

The Utah Interception Communications Act, U.C.A. §77-23a-1 through 16, as well as its federal counterpart, Title III of the Ominibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 to 2520, set forth the procedures for authorizing and approving the interception of wire communications. §77-23a-8, which was in existence at the time of Appellant's trial, authorized the County Attorneys or any Deputy County Attorney specially designated by the County Attorney to authorize an application for a wire or oral telecommunications intercept order.

The Utah Code requires the government to comply with the required application procedures or evidence obtained as a result of such surveillance must be suppressed at the criminal trial. As the United States Senate reported at the 113th Congressional Record 21861, concerning Title III, the Act

> ...Centeralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy to be used as electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develope. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way in guaranteeing that no abuses will happen. S.Rep. 1097, 90th Congress, 2nd Session, 96 through 97 (1968).

The procedures followed in securing Court authorization

to intercept Appellant's telephone communications did not rise to the level of conformity manditated by Title III, the United States Supreme Court's interpretation thereof, nor the Utah Interceptions Act, hereinafter referred to as "The Act". The level of compliance obtained by the Weber County Attorney's Office in this case falls far below that required by the Act and contemplated by Congress when it passed Title III.

In 1980, §77-23a-8, U.C.A. (1980), clearly required the County Attorney or a specially designated Deputy County Attorney to authorize the application for an Order permitting interception. In the case at hand, the County Attorney himself made the application, entitled Application. He did not sign it even though it was notarized.

§77-23a-10 (1) (1982) required that the application for an intercept order be in writing:

> Each application for an Order authorizing or approving the interception of wire or oral communications shall be made in writing upon oath or affirmation to a Judge of competent jurisdiction, and shall state the applicants authority to make the application....

Even though federal law holds that personal approval, or approval in fact, by the Attorney General of an application for an intercept order, overcomes facial insufficiencies because of incorrect signatures or the misidentification of the authorized

Attorney General, the Act clearly speaks for itself. An application shall be made in writing upon oath. Clearly Mr. Hughes did not sign his application under oath. This is not a case of misidentification or incorrect signatures. This is a case where the application is completely devoid of the signature. The Court of Appeals seems to overlook the problem that Mr. Hughes himself made application to the Court, as opposed to a police officer making application. The statute does not permit the County Attorney to simply authorize and then submit an unsigned, unsworn to application to the District Court Judge. The statute is very specific in requiring a writing upon oath or affirmation.

The Court of Appeals cites U.S. vs. Chavez, 416 U.S. 562 (1974), for the proposition that so long as the County Attorney is the official who authorized the application, someone else may sign the application. There was never any allegation made in U.S. vs. Chavez that the statutory requirement that the application be made in writing, under oath was ignored. To require anything less than a sworn writing as required by the statute would effectively destroy the requirement of authorization as it existed in 1980 and provide a convenient means to escape public accountability. If the County Attorney decided to actually make application instead of simply authorize the

application, it stands to reason that he should be held to the strict requirements of the statute.

The state's attorney argued, during Appellant's trial, that the Nunc Pro Tunc Order corrected the defective application, and so held Judge Roth. (T.T. @ pg 41). A decree Nunc Pro Tunc, however, is to record judicial action taken and not to remedy inaction. Bruce vs. Bruce, 4 Wash. 2nd 635, 296 P.2d 310. According to the Court in State vs. Ryan, 146 Wash. 114, 161 P 775, "it may be used to make the record speak the truth, but not to make it speak what it did not speak". It cannot, two months after the fact, heal an otherwise fatal application for a telecommunications intercept order. Again, I emphasize the fact that the County Attorney did not merely authorize the telecommunications intercept order in this case, he actually made application for that order himself.

The Order signed on May 23, 1986, was not only based upon writings representing procedural defects effecting the substantive rights of the Defendant, but it was facially void. §77-23a-10 (5) provides:

> No order entered under this section may authorize or approve the interception of any wire or oral communications for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days.

The May 23, 1986 order provides:

> This order authorizing the interception of telephonic communications upon the initial receipt of incriminating conversations but shall continue until enough evidence is obtained to accomplish the objectives herein stated, but in no event shall the authorization to intercept communications extend longer than thirty days past 0700 hours June 28, 1986, unless a specific extension is granted by the Court that this is a continuing criminal enterprise and that there is probable cause to believe that the communications ought to be intercepted will continue after the initial period of authorized interception. (emphasis added)

Likewise, the second order permitting interception states:

> ...But in no event shall the authorization extend longer than the thirty day extension, past 0700 hours July 27, 1986...

Clearly the Order purports to authorize wire communications interception for a period in excess of thirty days and is void on its face. Evidence obtained pursuant to the order and the June 27, 1986 order must be suppressed. If Defendant's trial counsel had made himself aware of the statutory manditates with regards to Title III and the Utah Interception Act, evidence obtained as a result of the void orders would have been suppressed by the trial Court. There can be no doubt that the Defendant was prejudiced by the failure of due diligence on defense counsel's part.

POINT II

THE JUNE 27, 1986 APPLICATION FOR AN ORDER AUTHORIZING

THE EXTENSION OF TIME FOR INTERCEPTION OF APPELLANT'S TELECOMMUNICATIONS WAS NOT AUTHORIZED BY A DEPUTY COUNTY ATTORNEY SPECIFICALLY DESIGNATED BY THE COUNTY ATTORNEY AS WAS REQUIRED BY §77-23a-8, U.C.A. (1980).

On June 27, 1986, William Daines, Deputy County Attorney, applied for an Order extending the time during which the State could intercept Appellant's telecommunications. The application nowhere indicates that Mr. Daines was the Deputy County Attorney specially designated to authorize an application, nor to make an application for an intercept order at all.

The Court of Appeals, at pg 6 of its opinion attached hereto, states that "the application is, nevertheless, valid. Defendant is merely making a semitic distinction between specially designated and duly authorized". The application indicates that Mr. Daines is a duly authorized County Attorney. This does not meet the requirements of the statute insofar as it does not indicate that he was specifically designated by the County Attorney to make applications. That was a statutory requirement at the time and was inserted into the statutory scheem so that each application for an intercept order may be passed upon by one of the highest law enforcement officials in government, and it named them. Congress and the legislature expected them to exercise personal judgment, before approving any applications. Routine processing by subornates was not to be the

approach. More responsibility than that which devolves upon any department head in any bureaucracy, that is, ultimate responsibility for what subornates do, was required. It would subvert the congressional scheme if we were to sanction anything less that strict compliance, much less the gross departure that has taken place in this case. As the Court of Appeals points out, the statute has since been amended to permit any County Attorney to make application for a wire tap intercept. However, this was not the case at the time of Appellant's trial on the matter.

The authorization requirements provided for in The Act were not mere technicalities; they were at the heart of the legislative scheme.

In U.S. vs. Giordiano, 94 S. Ct. 1823, an Assistant United States Attorney, Brocoto, submitted an application to a federal judge for an order permitting interception of the communications of Giordiano. The application recited that Assistant Attorney General Will Wilson had been specially designated by the Attorney General to authorize the application. Attached to the application was a letter from Mr. Wilson to Brocoto stating that Wilson had reviewed the request for authorization, and had made the necessary probable cause determination and then purported to authorize Brocoto to proceed with the application to the Court. Upon reviewing the application, the Judge issued an order author-

izing the interception "pursuant to application authorized by the Assistant Attorney General...Will Wilson, specifically designated by the Attorney General...". Giordiano at 94 Supreme Court 1823 and 1824.

It developed during Suppression Hearing that the application for interception authority had inaccurately described the officials who had authorized the application. Rather than Wilson having personally authorized the application, the executive assistant to the Attorney General reviewed the request for authorization and had concluded, from his "knowledge of the Attorney General's actions on previous cases, he would approve the request if submitted to him". Thus, the executive caused the Attorney General's initials to be placed on the Memorandum to Wilson instructing him to authorize Brocoto to proceed. Further, Wilson did not himself sign either of the letters bearing his name accompanying the applications to the District Court.

Although the scenario of the instant case differed somewhat from the factual background of Giordiano, a reading of the documents contained in the Addendum discloses similar procedural irregularities. First of all, the County Attorney choose to make the initial application to Judge Walhquist for a wire tap order as opposed to "authorizing" him, or an investigative or law enforcement officer to make the application. The application

made by Hughes should have been signed and a Motion Nunc Pro Tunc simply could not cure the defect. Mr. Hughes went a step beyond authorization insofar as he actually made the application himself and did not bother to sign or execute it himself prior to entry of the order. Strict compliance is a procedural requirement manditated by The Act and does not permit this kind of haphazard behavior in securing Court Orders. As stated in Giordiano at 94 Supreme Court 1827,

> Investigative personnel may not themselves ask the Judge for authority to wire tap or eavesdrop. A mature judgment of a particular, responsible....official is interposed as a critical pre-condition to any judicial order. (emphasis added).

Secondly a Deputy County Attorney attempted to make an application to the District Court for an order authorizing an extension of the May 23rd wire tap order. Mr. Daines indicated in his signed Affidavit that he was a Deputy County Attorney, had read the Affidavit of the police officer and believed the information contained in the application police officers affidavit to be true. Nowhere in his application does he allege that he was specially designated by the County Attorney to authorize an application, much less make an application himself.

This is precisely the type of situation contemplated by law makers prior to enactment of act of Title III and the Utah Act. The legislative history outlined in Giodiano supports this

view. The Act provides assurance of a reasonable executive determination of the need and justifiability of each interception and, it is clear that the authority must be exercised before the underlined application is presented to a Judge.

As to any affidavits submitted to the Court after the Wire Tap Orders were signed, the Giodiano Court stated in Footnote 12 @ 74 S. Ct. 1830:

> It would ill serve the Congressional policy of having the Attorney General or one of his assistants screen the applications prior to their submission to the Court to have the screening process occur after the application is made and after investigative officials have already begun to intercept wire or oral communications under a Court Order predicated on the assumption that proper authorization to apply for the intercept authority had been given.

POINT III

EVIDENCE OBTAINED PURSUANT TO THE TELECOMMUNICATIONS INTERCEPT ORDERS AND CONSEQUENTLY EVIDENCE OBTAINED AS A RESULT OF EXECUTION OF THE SEARCH WARRANT BASED UPON INFORMATION OBTAINED DIRECTLY THEREFROM, MUST BE SUPPRESSED PURSUANT TO §77-23a-7 AND §77-23a-10 (8), U.C.A. (1980).

Because the initial application for an intercept order was not executed in accordance with statutory requirements and because the approval of a Deputy County Attorney of the June 27th application does not comply with statutory requirements, the evidence obtained from the interceptions should have been suppressed and could not serve as a basis for probable cause in securing a

subsequent search warrant of Appellant's house.

§77-23a-7 provides that no part of the contents of any wire or oral communication, and no evidence derived therefrom, may be received from any proceeding in or before any Court or other authority of this state,

> If disclosure of that information would be in violation of this chapter.

What disclosures are forbidden, and are subject to Motions To Suppress, is in turn governed by §77-23a-10 (10)(a), U.C.A. (1980), which provides for suppression of evidence on the following grounds:

> 1. The communication was unlawfully intercepted;

The communications the government offered in support of the search warrant signed by Judge West for unlawfully intercepted within the meaning of paragraph 1 above, because the initial application for the intercept order was not executed prior to the entry of the order and because the application for extension of time during which to intercept Appellant's communication was not authorized by a Deputy County Attorney specially designated by the County Attorney to authorize the application or to make application himself.

Even though use of communications intercepted as a result of either order which I have hereintofore referred may

result in Constitutional violations, the words "unlawfully intercepted" are themselves not limited to Constitutional violations. Congress intended to require suppression where there is failure to satisfy any of the statutory requirements that directly and substantially implement the Congressional intention to limit the use of wire tap orders. Giordiano @ 94 S. Ct. 1832.

> We are confident that the provisions for pre application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored. i.d. @ 1832. (emphasis added).

POINT IV

> APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND §12 ARTICLE 1 OF THE CONSTITUTION OF THE STATE OF UTAH. APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING THE DISTRICT COURT PROCEEDINGS UPON WHICH THIS APPEAL IS BASED.

The Utah Telecommunications Statute requires a motion to suppress pursuant to that statute to be filed ten days prior to the date of trial. Defense counsel in this case filed a General Motion To Suppress only two days before Appellant's trial and failed to include in that Motion the precise grounds concerning the application and authorization requirements raised by Appellant on appeal. Instead, defense counsel apparently decided to "wing it" by bringing procedural irregularities before the

Court during Appellant's trial. Defense counsel totally failed to recognize the fact that Mr. Daines was not specifically designated by the County Attorney to make application for the extension order of June 1987. Defense counsel rendered a deficit performance and the outcome of the trial would definitely have been different but for counsel's error. Trial counsel's failure to articulate the problems with the State's application and authorizations was clearly not discretionary. His position as the attorney created duties incident thereto and demanded that he make the necessary inquiries into the State's case. Here, that case rested almost inclusively on telecommunication interceptions. It was incumbent upon defense counsel to bring to the attention of the State and to the Court the deficiencies so obvious in the application in support of the orders for interception of Appellant's communications. After all, those communications served as the exclusive source of information in support of the search warrant.

Although defense counsel apparently recognized some problems with the application procedure, his recognition was evidently a new discovery and he was ill prepared to argue the issues. (T.T. @ pgs. 38 through 41).

Although the Court of Appeals recognized that defense counsel filed a timely Motion To Suppress on the grounds that the

probable cause statement was insufficient to support the search warrant, the Court failed to recognize that pursuant to the Interceptions Act, a Suppression Motion must be filed at least ten days prior to the time of trial. Additionally, the Court indicates that defense counsel objected, at length, to the sufficiency of the probable cause statement. That is simply not Appellant's argument on Appeal. Appellant's argument on Appeal is defense counsels total lack of knowledge of the telecommunications statute and his ability to deal with the suppression issues arising therefrom at a Suppression Hearing which should have been heard prior to the day of trial. Additionally, the defense counsel's complete failure to raise the issue of whether or not Mr. Daines was specially designated by the County Attorney to make application and give authorization for the June Order was never brought to the attention of the Court. Even though this issue was raised for the first time on Appeal, it was raised under exceptional circumstances insofar as the Appellant's right to effective assistance of counsel is concerned. This is not a case where the trial counsel consciously choose a strategy that differs from that which Appellant's counsel thinks might have succeeded below, as was the case in State vs. Bullock, 119 Utah Adv. Rep. In this case, the trial Court committed plain error in admitting the evidence obtained as a direct result of a void tel-

ecommunications order and trial counsel was ineffective in failing to raise that objection to the trial Court. The Appellant does not have the space herein in order to provide the Court with the fully briefed issues of harmful error and that the trial Court's ruling was plainly erroneous. He would appreciate an opportunity to brief these issues to the Utah Supreme Court as a result of a grant of this Petition. Appellant would like the Supreme Court to assure that justice is done, even if trial counsel failed to act to bring a harmfully erroneously ruling to the attention of the trial Court. This is not a case, as was in Bullock, where a party, through counsel, made a conscious decision to refrain from objecting or lead the trial Court into error. Appellant asks that this Court balance the need for procedural regularities with the demands of fairness and grant Appellant's Petition.

RESPECTFULLY submitted this 27 day of November, 1989.

RANDINE SALERNO
Attorney at Law

CERTIFICATE OF HAND DELIVERY

I do hereby certify that I delivered a true and correct copy of the foregoing, to: Dan Larsen, Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84111, on this 1st day of ~~November~~ December, 1989.

RANDINE SALERNO
Attorney at Law

IN THE UTAH COURT OF APPEALS

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State of Utah,

Plaintiff and Respondent,

v.

David J. Hunt,

Defendant and Appellant.

OPINION
(For Publication)

Case No. 880386-CA

Second District, Weber County
Honorable David E. Roth

Attorneys: Randine R. Salerno, Ogden, for Appellant,
R. Paul Van Dam, Dan R. Larsen,
Sandra L. Sjogren, Salt Lake City, for Respondent

Before Judges Davidson, Bench, and Billings.

DAVIDSON, Judge:

Defendant David J. Hunt appeals from a bench trial conviction for possession of a controlled substance with intent to distribute for value. Defendant argues on appeal that the failure of the county attorney to sign the application for an intercept order invalidated the application, and therefore, the evidence obtained pursuant to the order should be suppressed. We affirm.

FACTS

On May 23, 1986, Weber County Attorney Donald C. Hughes, Jr. filed an application for an order to intercept wire communications from Hunt's residence. The application was supported by an affidavit signed by Sergeant Glen Warner, naming defendant as the main person involved in a drug organization that purchases and transports cocaine to suppliers along the Wasatch Front. Hughes inadvertently failed to sign the application. The omission was not initially noticed and Judge Wahlquist signed the

order authorizing interception of defendant's wire communications from May 29, 1986 through June 28, 1986. During that month, however, defendant left Salt Lake City and lived in California.

On June 27, 1986, Deputy Weber County Attorney William F. Daines applied for an extension of the intercept order. Attached to the application was an affidavit submitted by Sergeant Warner setting forth the results of the first intercept. Judge Wahlquist granted a thirty-day extension, from June 28, 1986, through July 27, 1986.

On July 26, 1986, Daines applied for a second extension of the intercept order from July 27, 1986 through August 3, 1986. While preparing that application, Daines discovered the omission of Hughes's signature on the original application. Hughes filed a motion nunc pro tunc to execute the original application. Judge Wahlquist granted the nunc pro tunc order making the execution of the original application effective May 23, 1986, and signed the order for the second extension of the intercept. The interception of defendant's wire communications ceased on August 3, 1986.

Based on the information gathered from the interception of defendant's wire communications, the police learned that a large drug transaction was about to take place between defendant and another person in Vista, California. On August 5, 1986, defendant placed a call to the other person and immediately left for California. Detectives in California informed the Utah police of defendant's arrival at the Vista residence.

On August 8, 1986, defendant drove back to Utah followed by four police cars and a police helicopter. The police obtained a search warrant for defendant's home and vehicles and on August 9, 1986, conducted a search. Thirty-four items of personal property were seized including one pound of cocaine, scales, scale weights, and a cocaine screen. Defendant was arrested and charged with possession of cocaine with the intent to distribute for value.

Prior to trial, defendant moved to suppress all evidence seized as a result of the search of his home and vehicles challenging the sufficiency of the probable cause statements in support of the search warrant. The motion was denied and a bench trial was held. Defendant's trial counsel objected at trial to the admission of any evidence obtained as a result of the intercept orders because they were not properly executed.

The judge ruled that the omission of the signature was not fatal to the order and that the nunc pro tunc order remedied any error. Defendant was convicted and sentenced to prison.

On May 29, 1988, Hughes filed a belated affidavit establishing his authorization of the application for the intercept order and his special designation of Daines as being "duly authorized," pursuant to Utah Code Ann. § 77-23a-8 (1982).

Defendant argues on appeal that the failure of the county attorney to sign the original application for the intercept order could not be remedied nunc pro tunc and that the order purported to authorize interception for a period in excess of that permitted by section 77-23a-10 (1982). Defendant also argues that the deputy county attorney was not "specially designated" pursuant to section 77-23a-8 to apply for the extensions. Finally, defendant argues that trial counsel provided ineffective assistance because these objections were not timely made.

AUTHORIZATION FOR AN INTERCEPT ORDER

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 to -2520, provides the framework for the Utah Interception of Communications Act, Utah Code Ann. §§ 77-23a-1 to -16 (Supp. 1989).[1] The Utah Act, as well as its federal counterpart, set forth the procedure for authorizing and approving the interception of wire communications. The version of section 77-23a-8, which was in effect at the time of trial, authorized the county attorney or any deputy county attorney, "specially designated" by the county attorney, to authorize an application for an intercept order.[2] Utah Code Ann. § 77-23a-10(1) (1982) requires that an application for an intercept order be in writing:

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1. Since the time of trial in this matter, the Utah Interception of Communications Act was amended by the legislature in both 1988 and 1989.

2. The 1989 amendment eliminated the "special designation" requirement. County attorneys are no longer required to "specially designate" deputy county attorneys to authorize applications for wire interceptions. The 1989 amendment now authorizes any deputy county attorney to authorize wire communications interceptions without first obtaining county attorney approval. Utah Code Ann. § 77-23a-8(1) (Supp. 1989).

> Each application for an order authorizing or approving the interception of wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction, and shall state the applicant's authority to make the application . . . .[3]

Defendant does not take issue with whether the application properly complied with the substantive requirements of section 77-23a-10(1), but claims that the omission of the county attorney's signature invalidated the application.

Federal case law holds that personal approval, or approval in fact, by the Attorney General of an application for an intercept order, overcomes facial insufficiencies because of incorrect signatures or the misidentification of the authorizing attorney general.[4] The test is whether the deficiencies are of the type which "require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." United States v. Lawson, 545 F.2d 557, 562 (7th Cir. 1975) (quoting United States v. Giondeno, 416 U.S. 505, 527 (1974)).

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3. The 1988 amendment to section 77-23a-10(1) inserted "electronic" following "wire" throughout the entire section. Utah Code Ann. § 77-23a-10 (Supp. 1988). The legislature, in 1989, also amended section 77-23a-10 but none of those changes affect this appeal.

4. United States v. Chavez, 416 U.S. 562 (1974); United States v. Smith, 726 F.2d 852, 859 (1st Cir. 1984) (en banc) ("The absence of a compelling signature on a critical document can be remedied by proof of actual authority."); United States v. Lawson, 545 F.2d 557 (7th Cir. 1975); United States v. Thomas, 508 F.2d 1200 (8th Cir. 1975), cert. denied, 421 U.S. 947 (1975); United States v. Brick, 502 F.2d 219 (8th Cir. 1974) (misidentifying assistant attorney general as authorizing person does not render interceptions unlawful); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972); United States v. Bowdach, 366 F. Supp. 1368 (S.D. Fla. 1973); and United States v. Schullo, 363 F. Supp. 246, 253 (D. Minn. 1973) ("[O]nce the Attorney General himself has approved an application for electronic surveillance, further ministerial acts are unimportant.").

The United States Supreme Court, in United States v. Chavez, 416 U.S. 562 (1974), decided whether it was appropriate to suppress evidence where statutory application procedures for an intercept order were not fully satisfied. In Chavez, the application and court order incorrectly identified the Assistant Attorney General as the authorizing official. Despite this procedural violation, the Supreme Court determined that the Attorney General had in fact authorized the application. The Court held that since there was not a claim of any constitutional infirmity arising from the defect, "it does not follow that because of this deficiency in reporting, evidence obtained pursuant to the order may not be used at a trial of respondents." Id. at 570. See also United States v. Bowdach, 366 F. Supp. at 1373 (S.D. Fla. 1973) (congressional scheme not violated where deputy attorney general signed order when attorney general had in fact approved the order). The Court distinguished its holding in Giordano by stating, "we did not go so far as to suggest that every failure to comply with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" Chavez, 416 U.S. at 574-75.

In determining whether technical violations rise to the level of constitutional infirmities, consideration of the rationale behind the procedural requirements in the Utah Act is important. Section 2518 of Title III, comparable to section 77-23a-10 of the Utah Act, "was designed to affix the lines of responsibility as a corollary to promoting a uniform policy in wire interception." Bowdach, 366 F. Supp. at 1373. "[A]lthough considerations of centralization and uniformity of decision-making are adjuncts to the protection of privacy, those considerations do not reach the level of constitutional status." Id. The purpose behind section 2516 of Title III, comparable to section 77-23a-8, requiring identification of the authorizing official in the application, "facilitates the court's ability to conclude that the application has been properly approved," and also fixes responsibility for the source of preliminary approval. Chavez, 416 U.S. at 575.

Defendant argues that to require anything less than a sworn writing would effectively destroy the requirement of authorization and provide a convenient means to escape public accountability. However, there was ample evidence to show that Hughes did in fact approve the application for the intercept order, and is clearly accountable for such authorization. The application identified Hughes numerous times as the one authorizing the application and he submitted an affidavit attesting to the fact that he approved the applications. By

inadvertently omitting his signature, Hughes did not compromise the privacy of wire and oral communications as provided in section 77-23a-2 (1982).

"SPECIALLY DESIGNATED" DEPUTY COUNTY ATTORNEY

Defendant contends that the applications for extensions of time for the interceptions were not authorized by a "deputy county attorney specially designated by the county attorney" in accordance with section 77-23a-8 (1982):

> [A]ny county attorney or any deputy county attorney specially designated by the county attorney, may authorize an application to a Utah State district court judge of competent jurisdiction for, and the judge may grant . . . an order authorizing or approving the interception of a wire or oral communication . . . .

(emphasis added.)[5]

This issue is raised for the first time on appeal and "[i]n the absence of exceptional circumstances, [Utah appellate courts have] long refused to review matters raised for the first time on appeal where no timely and proper objection was made in the trial court." State v. Loe, 732 P.2d 115, 117 (Utah 1987). Even if this issue had been raised below, the application is, nevertheless, valid. Defendant is merely making a semantic distinction between "specially designated" and "duly authorized." The application for the extension stated that Deputy County Attorney William F. Daines is "duly

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5. The amended portion of section 77-23a-8 currently appears as follows:

> The attorney general of the state or any assistant attorney general, or any county attorney or deputy county attorney may authorize an application to a judge of competent jurisdiction for an order for an interception of wire, electronic, or oral communications. . . .

Utah Code Ann. § 77-23a-8 (Supp. 1989).

authorized by Donald C. Hughes, Weber County Attorney, to make this application." In light of the foregoing analysis, this distinction is meritless.

EFFECTIVE ASSISTANCE OF COUNSEL

Defendant finally claims ineffective assistance of counsel. In order to establish ineffective counsel, "it is the defendant's burden to show: (1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error." State v. Geary, 707 P.2d 645, 646 (Utah 1985). See also Strickland v. Washington, 466 U.S. 668 (1984). Failure to show either deficient performance or resulting prejudice will defeat a claim of ineffective counsel. Geary, 707 P.2d at 646. The Utah Supreme Court recently applied the Strickland test in State v. Archuleta, 747 P.2d 1019 (Utah 1987):

> Before this Court will consider whether specific conduct falls below the required standard of objective reasonableness, the person arguing ineffective assistance must show that the conduct prejudiced his case. . . . (citations omitted). In order to prove prejudice to his case, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 1023 (quoting Strickland, 466 U.S. at 694).

Defendant asserts that his trial counsel was ineffective for the following reasons: (1) he failed to file a timely motion to suppress certain incriminating evidence; (2) he failed to object to the sufficiency of the probable cause statement in support of the search warrant; (3) he failed to object to the sufficiency of the affidavit in support of the intercept order; and (4) he failed to articulate and support his objection to certain evidence.

Defendant's first two claims are inconsistent with the trial record as it appears before us. Trial counsel filed a timely motion to suppress on the ground that the probable cause statement was insufficient to support the search warrant. At

trial, counsel also objected, at length, to the sufficiency of the probable cause statement. Both the motion and the objections were denied. We defer to trial counsel's professional judgment and trial strategy in not pursuing this line of objection. See State v. Medina, 738 P.2d 1021, 1023 (Utah 1987). "Decisions as to what witnesses to call, what objections to make, and, by and large, what defenses to interpose, are generally left to the professional judgment of counsel." State v. Wood, 648 P.2d 71, 91 (Utah 1982), cert. denied, 459 U.S. 988 (1982).

We are not persuaded that defendant's trial counsel was ineffective. Even if all of defendant's claims were true, we are not persuaded that the outcome would have been different.

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.

Strickland, 466 U.S. at 695.

The trial court found defendant guilty beyond a reasonable doubt. The evidence amply supports this finding.

Affirmed.

Richard C. Davidson, Judge

WE CONCUR:

Russell W. Bench, Judge

Judith M. Billings, Judge

COVER SHEET

CASE TITLE:

State of Utah,
Plaintiff and Respondent,
v.
David J. Hunt,
Defendant and Appellant.

Case No. 880386-CA

PARTIES:

Randine Salerno (Argued)
Attorney for Appellant
2568 Washington Blvd., #205
Ogden, UT 84401

R. Paul Van Dam
Attorney General
Dan R. Larsen (Argued)
Assistant Attorney General
B U I L D I N G M A I L

TRIAL JUDGE:

Honorable David E. Roth

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, affirmed.
Opinion of the Court by RICHARD C. DAVIDSON, Judge; RUSSELL W. BENCH, and JUDITH M. BILLINGS, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of October, 1989, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.

Deputy Clerk

TRIAL COURT:

Weber County, Second District Court. No. 17750

rant. The magistrate may direct that specific modifications be made in the warrant. Upon approval, the magistrate shall direct the law enforcement officer or the prosecuting attorney for the government who is requesting the warrant to sign the magistrate's name on the warrant. This warrant shall be called a duplicate original warrant and shall be deemed a warrant for purposes of this chapter. In such cases the magistrate shall cause to be made an original warrant. The magistrate shall enter the exact time of issuance of the duplicate original warrant on the face of the original warrant.

(b) Return of a duplicate original warrant and the original warrant shall be in conformity with this chapter. Upon return, the magistrate shall require the person who gave the sworn oral testimony establishing the grounds for issuance of the warrant to sign a copy of the transcript.

(3) If probable cause is shown, the magistrate shall issue a search warrant. 1980

77-23-5. Time for service — Officer may request assistance.

(1) The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits or oral testimony state a reasonable cause to believe a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason; in which case he may insert a direction that it be served any time of the day or night. An officer may request other persons to assist him in conducting the search.

(2) The search warrant shall be served within ten days from the date of issuance. Any search warrant not executed within such time shall be void and shall be returned to the court or magistrate as not executed. 1980

77-23-6. Receipt for property taken.

When the officer seizes property pursuant to a search warrant, he shall give a receipt to the person from whom it was seized or in whose possession it was found. If no person is present, the officer shall leave the receipt in the place where he found the property. Failure to give or leave a receipt shall not render the evidence seized inadmissible at trial. 1980

77-23-7. Return — Inventory of property taken.

The officer, after execution of the warrant, shall promptly make a verified return of the warrant to the magistrate and deliver a written inventory of anything seized, stating the place where it is being held. 1980

77-23-8. Safekeeping of property.

The officer seizing the property shall be responsible for its safekeeping and maintenance until the court otherwise orders. 1980

77-23-9. Return of papers to district court.

The magistrate shall annex to the depositions and affidavits upon which the search warrant is based the search warrant, the return, and the inventory, however, if he is without authority to proceed further with respect to the offense under which the warrant was issued, he shall return them to the appropriate court of the county having jurisdiction within 15 days after the return. 1980

77-23-10. Force used in executing warrant — Notice of authority prerequisite, when.

When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:

(1) If, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness; or

(2) Without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given. 1980

77-23-11. Violation of health, safety, building or animal cruelty laws or ordinances — Warrants to obtain evidence.

In addition to other warrants provided by this chapter, magistrates, upon a showing of probable cause to believe a state, county, or city law, or ordinance has been violated in relation to health, safety, building, or animal cruelty, may issue a warrant for the purpose of obtaining evidence of such violation. Such warrants may be obtained from a magistrate upon request of peace officers and state, county, and municipal health, fire, building, and animal control personnel only after approval by a prosecuting attorney. A search warrant issued under this section shall be directed to any peace officer within the county where the warrant is to be executed, who shall serve the same. Other concerned personnel may accompany the officer. 1980

77-23-12. Evidence seized pursuant to warrant not excluded unless unlawful search or seizure substantial — "Substantial" defined.

Pursuant to the standards described in Section 77-35-12(g) property or evidence seized pursuant to a search warrant shall not be suppressed at a motion, trial, or other proceeding unless the unlawful conduct of the peace officer is shown to be substantial. Any unlawful search or seizure shall be considered substantial and in bad faith if the warrant was obtained with malicious purpose and without probable cause or was executed maliciously and willfully beyond the authority of the warrant or with unnecessary severity. 1983

CHAPTER 23a

INTERCEPTION OF COMMUNICATIONS

Section

77-23a-1. Short title.

This act shall be known and may be cited as the "Interception of Communications Act." 1980

77-23a-2. Legislative findings.

The legislature finds and determines that:

(1) Wire communications are normally conducted through facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications.

(2) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of these communications and the use of the contents thereof in evidence in courts and administrative proceedings.

(3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused. 1980

77-23a-3. Definitions.

As used in this chapter:

(1) "Aggrieved person" means a person who was a party to any intercepted wire, electronic, or oral communication, or a person against whom the interception was directed.

(2) "Aural transfer" means any transfer containing the human voice at any point between and including the point of origin and the point of reception.

(3) "Communications common carrier" means any person engaged as a common carrier for hire, in intrastate, interstate, or foreign communication, by wire or radio, including a provider of electronic communication service, but a person engaged in radio broadcasting is not, when that person is so engaged, deemed a communications common carrier.

(4) "Contents" when used with respect to any wire, electronic, or oral communication, includes any information concerning the substance, purport, or meaning of that communication.

(5) "Electronic communication" means any transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system, but does not include:

(a) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;

(b) any wire or oral communications;

(c) any communication made through a tone only paging device; or

(d) any communication from an electronic or mechanical device that permits the tracking of the movement of a person or object.

(6) "Electronic communications service" means any service that provides for users the ability to send or receive wire or electronic communications.

(7) "Electronic communications system" means any wire, radio, electromagnetic, photoelectronic, or photo-optical facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of the communication.

(8) "Electronic, mechanical, or other device" means any device or apparatus that may be used to intercept a wire, electronic, or oral communication other than:

(a) any telephone or telegraph instrument, equipment or facility, or any component of them:

(i) furnished to the subscriber or user by a provider of wire or electronic communications service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or

(ii) being used by a provider of wire or electronic communications service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties; or

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(9) "Electronic storage" means:

(a) any temporary intermediate storage of a wire or electronic communication incident to the electronic transmission of it; and

(b) any storage of the communication by an electronic communications service for the purposes of backup protection of the communication.

(10) "Intercept" means the aural acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(11) "Investigative or law enforcement officer" means any officer of the state or a political subdivision, who by law may conduct investigations of, or make arrests for, offenses enumerated in this chapter, and any attorney authorized by law to

prosecute or participate in the prosecution of these offenses.

(12) "Judge of competent jurisdiction" means a judge of a district court of the state.

(13) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception, under circumstances justifying that expectation, but does not include any electronic communication.

(14) "Pen register" means a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which the device is attached, but does not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by the provider or any device used by a provider or customer of a wire communications service for cost accounting or other like purposes in the ordinary course of its business.

(15) "Person" means any employee or agent of the state or a political subdivision, and any individual, partnership, association, joint stock company, trust, or corporation.

(16) "Readily accessible to the general public" means, regarding a radio communication, that the communication is not:

(a) scrambled or encrypted;

(b) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of the communication;

(c) carried on a subcarrier or signal subsidiary to a radio transmission;

(d) transmitted over a communications system provided by a common carrier, unless the communication is a tone only paging system communication; or

(e) transmitted on frequencies allocated under Part 25, Subpart D, E, or F of Part 74, or Part 94, Rules of the Federal Communications Commission, unless in the case of a communication transmitted on a frequency allocated under Part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.

(17) "Trap and trace device" means a device that captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication is transmitted.

(18) "User" means any person or entity who:

(a) uses an electronic communications service; and

(b) is authorized by the provider of the service to engage in the use.

(19) (a) "Wire communication" means any aural transfer communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating these facilities for the transmission of intrastate, interstate, or foreign communications.

(b) "Wire communication" does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit. 1988

77-23a-4. Offenses — Lawful interception.

(1) Except as otherwise specifically provided in this chapter, any person who does any of the following is guilty of a felony of the third degree:

(a) intentionally or knowingly intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, electronic, or oral communication;

(b) intentionally or knowingly uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication, when:

(i) the device is affixed to, or otherwise transmits a signal through a wire, cable, or other like connection used in wire communication; or

(ii) the device transmits communications by radio, or interferes with the transmission of the communication;

(c) intentionally or knowingly discloses, or endeavors to disclose, to any other person the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this section; or

(d) intentionally or knowingly uses, or endeavors to use, the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this section.

(2) (a) The operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire communication, may intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except a provider of wire communications service to the public may not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) Providers of wire or electronic communications service, their officers, employees, agents, landlords, custodians, or other persons, may provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, if the provider, its officers, employees, agents, landlords, custodians, or other specified persons has been provided with:

(i) a court order directing the assistance signed by the authorizing judge; or

(ii) a certification in writing by a person specified in Subsection 77-23a-10(7), or by the attorney general of the state, a deputy attorney general, or by a county attorney, or by a deputy county attorney, that no warrant or court order is required by law, that all

statutory requirements have been met, and that the specified assistance is required.

(c) The order or certification shall set forth the period of time during which the provision of the information, facilities, or technical assistance is authorized, and shall specify the information, facilities, or technical assistance required

(d) The provider of wire or electronic communications service, or its officers, employees, agents, landlords, custodians, or other specified persons may not disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance regarding which the person has been furnished an order or certification under this section, except as is otherwise required by legal process, and then only after prior notification to the attorney general of the state or to the county attorney of the county in which the interception was conducted, as is appropriate

(e) Any disclosure under Subsection (2)(d) renders the person liable for civil damages under Section 77-23a-11

(f) A cause of action does not lie in any court against any provider of wire or electronic communications service, its officers, employees, agents, landlords, custodians, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter

(g) Subsections (2)(b) through (f) supersede any law to the contrary

(h) A person acting under color of law may intercept a wire, electronic, or oral communication, if that person is a party to the communication, or one of the parties to the communication has given prior consent to the interception

(i) A person not acting under color of law may intercept a wire or oral communication if that person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of state or federal laws

(j) An employee of a telephone company may intercept a wire communication for the sole purpose of tracing the origin of the communication when the interception is requested by the recipient of the communication and the recipient alleges that the communication is obscene, harassing, or threatening in nature The individual conducting the interception shall notify local police authorities within 48 hours after the time of interception.

(k) A person may

(i) intercept or access an electronic communication made through an electronic communications system that is configured so that the electronic communication is readily accessible to the general public,

(ii) intercept any radio communication when it is transmitted by

(A) any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress,

(B) any government, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public,

(C) a station operating on an authorized frequency within the bands allocated to the amateur, citizens' band, or general mobile radio services; or

(D) by a marine or aeronautics communications system,

(iii) intercept any wire or electronic communication, the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of the interference, or

(iv) as one of a group of users of the same frequency, intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of the system, if the communication is not scrambled or encrypted

(l) Under Sections 77-23a-3 through 77-23a-11 a person may

(i) use a pen register or trap and trace device, or

(ii) as a provider of electronic communications service, record the fact that a wire or electronic communication was initiated or completed, to protect the provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of the service

(3) (a) Except under Subsection (3)(b), a person or entity providing an electronic communications service to the public may not intentionally divulge the contents of any communication, other than the one to the person or entity, or its agent, while in transmission on that service to any person or entity other than an addressee or intended recipient of the communication or his agent

(b) A person or entity providing electronic communications service to the public may divulge the contents of any communication.

(i) as otherwise authorized under Subsection (2), or Section 77-23a-9,

(ii) with lawful consent of the originator or any addressee or intended recipient of the communication,

(iii) to a person employed or authorized, or whose facilities are used, to forward the communication to its destination, or

(iv) that is inadvertently obtained by the service provider and appears to pertain to the commission of a crime, if the divulgence is made to a law enforcement agency

(4) (a) Except under Subsection (4)(b) or Subsection (5), a violation of Subsection (1) is a third degree felony

(b) If the offense is a first offense under Subsection (4)(a) and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication regarding which the offense under Subsection (4)(a) is a radio communication that is not scrambled or encrypted, and

(i) if the communication is not the radio portion of a cellular telephone communication, a public land mobile radio service communication, or paging service communication, and the conduct is not under Subsection (5), the offense is a class A misdemeanor; and

(ii) if the communication is the radio portion of a cellular telephone communication, a public land mobile radio service communication, or a paging service communication, the offense is a class B misdemeanor.

(c) Conduct otherwise an offense under this subsection, that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted:

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls, is not an offense under this subsection unless the conduct is for the purpose of direct or indirect commercial advantage or private financial gain.

(5) (a) If the communication is a:

(i) private satellite video communication that is not scrambled or encrypted, and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(ii) a radio communication that is transmitted on frequencies allocated under Subpart D, Part 74, Rules of the Federal Communication Commission, that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the person who engages in the conduct is subject to suit by the state in a court of competent jurisdiction.

(b) In an action under Subsection (5)(a):

(i) If the violation of this chapter is a first offense under Subsection (1) and the person is not found liable in a civil action under Section 77-23a-11, the state may seek appropriate injunctive relief.

(ii) If the violation of this chapter is a second or subsequent offense under Subsection (1), or the person has been found liable in any prior civil action under Section 77-23a-11, the person is subject to a mandatory $500 civil fine.

(c) The court may use any means within its authority to enforce an injunction issued under Subsection (5)(b)(i), and shall impose a civil fine of not less than $500 for each violation of the injunction. 1988

77-23a-5. Traffic in intercepting devices — Offenses — Lawful activities.

(1) Except as otherwise specifically provided in this chapter, any person who intentionally does any of the following is guilty of a felony of the third degree:

(a) sends through the mail, or sends or carries in intrastate, interstate, or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious interception of wire, electronic, or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious interception of wire, electronic, or oral communications; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of:

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious interception of wire, electronic, or oral communications; or

(ii) any other electronic, mechanical, or other device, where the advertisement promotes the use of the device for the purpose of the surreptitious interception of wire, electronic, or oral communications.

(2) A provider of wire or electronic communications service or an officer, agent, or employee of, or a person under contract with the provider, may in the normal course of the business of providing that wire or electronic communications service, or an officer, agent, or employee of, or a person under contract with, the United States, a state, or a political subdivision, in the normal course of the activities of the United States, a state, or a political subdivision, to send through the mail, send or carry in intrastate, interstate, or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of the device renders it primarily useful for the purpose of surreptitious interception of wire, electronic, or oral communications. 1988

77-23a-6. Seizure and forfeiture of intercepting devices.

Any electronic, mechanical or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of Sections 77-23a-4 and 77-23a-5, may be seized and forfeited to the State of Utah. 1988

77-23a-7. Evidence — Exclusionary rule.

When any wire, electronic, or oral communication has been intercepted, no part of the contents of the communication and no evidence derived from it may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision of the state, if the disclosure of that information would be in violation of this chapter. 1988

77-23a-8. Court order to authorize or approve interception — Procedure.

The attorney general of the state, or any assistant attorney general specially designated by the attorney general or any county attorney or any deputy county attorney specially designated by the county attorney, may authorize an application to a judge of competent jurisdiction for, and the judge may grant in conformity with the procedures for interception of wire, electronic, or oral communications by any law enforcement agency of this state or any political subdivisions responsible for the investigation of the type of offense regarding which the application is made, an order authorizing or approving the interception of a wire, electronic, or oral communication by any law enforcement agency of this state or any political subdivision responsible for investigation of the offense for which the application is made, when the interception sought may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in

narcotic drugs, marihuana, or other dangerous drugs, or other offense dangerous to life, limb, or property, and punishable by imprisonment for more than one year, or any conspiracy to commit any of these offenses 1988

77-23a-9. Disclosure or use of intercepted information.

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, electronic, or oral communication or evidence derived from any of these may disclose those contents to another investigative or law enforcement officer to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter has obtained knowledge of the contents of any wire, electronic, or oral communication or evidence derived from any of them may use those contents to the extent the use is appropriate to the proper performance of his official duties

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, electronic, or oral communication or evidence derived from any of them intercepted in accordance with this chapter may disclose the contents of that communication or the derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any state or political subdivision

(4) An otherwise privileged wire, electronic or oral communication intercepted in accordance with or in violation of, the provisions of this chapter does not lose its privileged character

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, electronic, or oral communications in the manner authorized, intercepts wire, electronic, or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents, and evidence derived from the contents may be disclosed or used as provided in Subsections (1) and (2) The contents and any evidence derived from them may be used under Subsection (3) when authorized or approved by a judge of competent jurisdiction if the judge finds on subsequent application that the contents were otherwise intercepted in accordance with this chapter The application shall be made as soon as practicable. 1988

77-23a-10. Application for order — Authority of order — Emergency action — Application — Entry — Conditions — Extensions — Recordings — Admissibility or suppression — Appeal by state.

(1) Each application for an order authorizing or approving the interception of a wire, electronic or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction, and shall state the applicant's authority to make the application. Each application shall include the following

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application,

(b) a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including

(i) details regarding the particular offense that has been, is being, or is about to be committed,

(ii) except as provided in Subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted,

(iii) a particular description of the type of communication sought to be intercepted, and

(iv) the identity of the person, if known, committing the offense and whose communication is to be intercepted,

(c) a full and complete statement as to whether other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous,

(d) a statement of the period of time for which the interception is required to be maintained, and if the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and the individual making the application, made to any judge for authorization to intercept, or for approval of interceptions of wire, electronic, or oral communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each application,

(f) when the application is for the extension of an order, a statement setting forth the results so far obtained from the interception, or a reasonable explanation of the failure to obtain results; and

(g) additional testimony or documentary evidence in support of the application as the judge may require

(2) Upon application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, electronic, or oral communications within the territorial jurisdiction of the state, if the judge determines on the basis of the facts submitted by the applicant that

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in Section 77-23a-8,

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through the interception,

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous,

(d) except under Subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, electronic, or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by that person

(3) Each order authorizing or approving the interception of any wire, electronic, or oral communication shall specify

(a) the identity of the person, if known, whose communications are to be intercepted,

(b) except as provided in Subsection (11), the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted,

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates,

(d) the identity of the agency authorized to intercept the communications, and of the persons authorizing the application, and

(e) the period of time during which the interception is authorized, including a statement as to whether the interception shall automatically terminate when the described communication has been first obtained

(4) An order authorizing the interception of a wire, electronic, or oral communication shall, upon request of the applicant, direct that a provider of wire or electronic communications service, landlord, custodian, or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that the provider, landlord, custodian, or person is according the person whose communications are to be intercepted Any provider of wire or electronic communications service, landlord, custodian, or other person furnishing the facilities or technical assistance shall be compensated by the applicant for reasonable expenses involved in providing the facilities or systems

(5) (a) An order entered under this chapter may not authorize or approve the interception of any wire, electronic, or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days The 30 day period begins on the day the investigative or law enforcement officer first begins to conduct an interception under the order, or ten days after the order is entered, whichever is earlier

(b) Extensions of an order may be granted, but only upon application for an extension made under Subsection (1), and if the court makes the findings required by Subsection (2) The period of extension may be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted, but in no event for longer than 30 days

(c) Every order and extension shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted so as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event within 30 days

(d) If the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after the interception

(e) An interception under this chapter may be conducted in whole or in part by government personnel, or by an individual operating under a contract with the government, acting under supervision of an investigative or law enforcement officer authorized to conduct the interception

(6) When an order authorizing interception is entered under this chapter, the order may require reports to be made to the judge who issued the order, showing what progress has been made toward achievement of the authorized objective and the need for continued interception These reports shall be made at intervals the judge may require

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, designated by the attorney general of the state, a deputy attorney general, a county attorney, or a deputy county attorney, acting pursuant to a state statute, who reasonably determines that

(a) an emergency situation exists that involves

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime, that require a wire, electronic, or oral communication to be intercepted before an order authorizing interception can, with diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize the interception, may intercept wire, electronic, or oral communication if an application for an order approving the interception is made in accordance with this section, within 48 hours after the interception has occurred, or begins to occur

In the absence of an order, the interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier If the application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, electronic, or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in Subsection (8)(d) on the person named in the application.

(8) (a) The contents of any wire, electronic, or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device The recording of the contents of any wire, electronic, or oral communication under this subsection shall be done so as to protect the recording from editing or other alterations. Immediately upon the expiration of the period of an order, or extension, the recordings shall be made available to the judge issuing the order and sealed under his directions Custody of the recordings shall be where the judge orders The recordings may not be destroyed, except upon an order of the issuing or denying judge In any event, it shall be kept for ten years. Duplicate recordings may be made for use or disclosure under Subsections 77-23a-9(1) and (2) for investigations. The presence of the seal provided by this subsection, or a satisfactory explanation for the absence of one, is a prerequisite for the use or disclosure of the contents of any wire, electronic, or oral communication or evidence derived from it under Subsection 77-23a-9(3)

(b) Applications made and orders granted under this chapter shall be sealed by the judge Custody of the applications and orders shall be where the judge directs. The applications and orders shall be disclosed only upon a showing of good

cause before a judge of competent jurisdiction and may not be destroyed, except on order of the issuing or denying judge But in any event they shall be kept for ten years

(c) Any violation of any provision of this subsection may be punished as contempt of the issuing or denying judge

(d) Within a reasonable time, but not later than 90 days after the filing of an application for an order of approval under Subsection 77-23a-10(7) that is denied or the termination of the period of an order or extensions, the issuing or denying judge shall cause to be served on the persons named in the order or the application, and other parties to intercepted communications as the judge determines in his discretion is in the interest of justice, an inventory, which shall include notice of

(i) the entry of the order or application,

(ii) the date of the entry and the period of authorization, approved or disapproved interception, or the denial of the application, and

(iii) that during the period wire, electronic, or oral communications were or were not intercepted.

(e) The judge, upon filing of a motion, may in his discretion make available to the person or his counsel for inspection the portions of the intercepted communications, applications, and orders the judge determines to be in the interest of justice On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed

(9) The contents of any intercepted wire, electronic, or oral communication, or evidence derived from any of them, may not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a federal or state court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving the information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States Utah, or a political subdivision, may move to suppress the contents of any intercepted wire, electronic, or oral communication, or evidence derived from any of them, on the grounds that

(i) the communication was unlawfully intercepted,

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face, or

(iii) the interception was not made in conformity with the order of authorization or approval

(b) The motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion If the motion is granted, the contents of the intercepted wire, electronic, or oral communication, or evidence derived from any of them, shall be treated as having been obtained in violation of this chapter The judge, upon the filing of the motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection portions of the intercepted communication or evidence derived from them as the judge determines to be in the interests of justice

(c) In addition to any other right to appeal, the state may appeal from an order granting a motion to suppress made under Subsection (10)(a), or the denial of an application for an order of approval, if the attorney bringing the appeal certifies to the judge or other official granting the motion or denying the application that the appeal is not taken for the purposes of delay The appeal shall be taken within 30 days after the date the order was entered, and shall be diligently prosecuted

(d) The remedies and sanctions described in this chapter regarding the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving these communications

(11) The requirements of Subsections (1)(b)(ii), and (2)(d), and (3)(b) of this section relating to the specification of the facilities from which, or the place where the communication is to be intercepted do not apply if

(a) in the case of an applicant regarding the interception of an oral communication,

(i) the application is by a law enforcement officer and is approved by the state attorney general, a deputy attorney general, a county attorney, or a deputy county attorney;

(ii) the application contains a full and complete statement of why the specification is not practical, and identifies the person committing the offense and whose communications are to be intercepted,

(iii) the judge finds that the specification is not practical, and

(b) in the case of an application regarding wire or electronic communication,

(i) the application is by a law enforcement officer and is approved by the state attorney general, a deputy attorney general, a county attorney, or a deputy county attorney;

(ii) the application identifies the person believed to be committing the offense and whose communications are to be intercepted, and the applicant makes a showing of a purpose, on the part of that person, to thwart interception by changing facilities, and

(iii) the judge finds that the purpose has been adequately shown.

(12) (a) An interception of a communication under an order regarding which the requirements of Subsections (1)(b)(ii), (2)(d), and (3)(b) do not apply by reason of Subsection (11), does not begin until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order

(b) A provider of wire or electronic communications service that has received an order under Subsection (11)(b) may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the government, shall decide the motion expeditiously 1988

77-23a-11. Civil remedy for unlawful interception — Action for relief.

(1) Except under Subsection 77-23a-4(2)(b), a person whose wire, electronic, or oral communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity that engaged in the violation, relief as appropriate

(2) In an action under this section appropriate relief includes

(a) preliminary and other equitable or declaratory relief, as is appropriate,

(b) damages under Subsection (3) and punitive damages in appropriate cases, and

(c) a reasonable attorney's fee and reasonably incurred litigation costs

(3) (a) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted, or if the communication is a radio communication that is transmitted on frequencies allocated under Subpart (D), Part 74, Rules of the Federal Communications Commission, that is not scrambled or encrypted, and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, the court shall assess damages as follows

(i) if the person who engaged in the conduct has not previously been enjoined under Subsection 77-23a-4(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or the statutory damages of not less than $50 nor more than $500,

(ii) if on one prior occasion the person who engaged in the conduct has been enjoined under Subsection 77-23a-4(5) or has been liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1,000,

(b) In any other action under this section, the court may assess as damages whichever is the greater of

(i) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violations or

(ii) statutory damages of $100 a day for each day of violation, or $10,000, whichever is greater.

(4) A good faith reliance on

(a) a court order, a grand jury subpoena, a legislative authorization, or a statutory authorization,

(b) a request of an investigative or law enforcement officer under Subsection 77-23a-10(7), or

(c) a good faith determination that Subsection 77-23a-4(3) permitted the conduct complained of and is a complete defense against any civil or criminal action brought under this chapter or any other law

(5) A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation. 1988

77-23a-12. Enjoining a violation — Civil action by attorney general.

(1) When it appears that a person is engaged or is about to engage in any act that constitutes or will constitute a felony violation of this chapter, the attorney general may initiate a civil action in a district court of the state to enjoin the violation.

(2) The court shall proceed as soon as practicable to the hearing and determination of the action, and may, at any time before final determination, enter a restraining order or prohibition, or take other action as warranted to prevent a continuing and substantial injury to the state or to any person or class of persons for whose protection the action is brought

(3) A proceeding under this section is governed by the Utah Rules of Civil Procedure, except if an information has been filed or an indictment has been returned against the respondent, discovery is governed by the Utah Rules of Criminal Procedure 1988

77-23a-13. Installation of device when court order required — Penalty.

(1) Except as provided in this section, a person may not install or use a pen register or trap or trace device without previously obtaining a court order under Section 77-23a-15, or under federal law

(2) Subsection (1) does not apply to the use of a pen register or trap and trace device by a provider of electronic or wire communications services.

(a) relating to the operation, maintenance, and testing of a wire or electronic communications service or to the protection of the rights or property of the provider, or to the protection of users of that service from abuse of service or unlawful use of service, or

(b) to record that a wire or electronic communication was initiated or completed to protect the provider, another provider furnishing service toward the completion of the wire communication, or a user of that service from fraudulent, unlawful, or abusive use of that service, or

(c) when the consent of the user of that service has been obtained.

(3) A knowing or intentional violation of Subsection (1) is a class A misdemeanor 1988

77-23a-14. Court order for installation — Application.

(1) The attorney general, a deputy attorney general, a county attorney, a deputy county attorney, or a prosecuting attorney for a political subdivision of the state, or a law enforcement officer, may make application for an order or extension of an order under Section 77-23a-15 authorizing or approving the installation and use of a pen register or trap and trace device, in writing and under oath or equivalent affirmation, to a court of competent jurisdiction

(2) An application under Subsection (1) shall include

(a) the identity of the attorney for the government or the law enforcement or investigative officer making the application and the identity of the law enforcement agency conducting the investigation, and

(b) a certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency 1988

77-23a-15. Order for installation — Contents — Duration — Extension — Disclosure.

(1) In general, upon an application made under Section 77-23a-14, the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device within the jurisdic-

tion of the court, if the court finds that the attorney for the government or the law enforcement or investigative officer has certified to the court that the information likely to be obtained by the installation and use is relevant to an ongoing criminal investigation

(2) (a) An order issued under this section shall specify

(i) the identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached,

(ii) the identity, if known, of the person who is the subject of the criminal investigation,

(iii) the number and, if known, physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographical limits of the trap and trace order; and

(iv) a statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates

(b) The order shall direct, upon the request of the applicant, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device under Section 77-23a-16

(3) (a) An order issued under this section may authorize the installation and use of a pen register or trap and trace device for a period not to exceed 60 days

(b) Extensions of an order may be granted, but only upon an application for an order under Section 77-23a-14 and upon the judicial finding required by Subsection (1) The period of extension shall be for a period not to exceed 60 days

(4) An order authorizing or approving the installation and use of a pen register or trap and trace device shall direct that.

(a) the order be sealed until otherwise ordered by the court, and

(b) the person owning or leasing the line to which the pen register or trap and trace device is attached, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless otherwise ordered by the court 1988

77-23a-16. Communications provider — Cooperation and support services — Compensation — Liability defense

(1) Upon the request of an attorney for the government or an officer of a law enforcement agency authorized to install and use pen registers under this chapter, a provider of wire or electronic communications service, landlord, custodian, or other person shall furnish investigative or law enforcement officers forthwith all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the services the person ordered by the court accords the party regarding whom the installation and use is to take place, if such assistance is directed by a court order as provided in Subsection 77-23a-15(2)(b) of this chapter

(2) (a) Upon request of an attorney for the government or an officer of a law enforcement agency authorized to receive the results of a trap and trace device under this chapter, a provider of wire or electronic communications service, landlord, custodian, or other person shall install the device forthwith on the appropriate line.

(b) He shall also furnish the investigative or law enforcement officer all additional information, facilities, and technical assistance, including installation and operation of the device unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if the installation and assistance is directed by a court order under Subsection 77-23a-15(2)(b)

(c) Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished to the officer of the law enforcement agency designated by the court, at reasonable intervals and during regular business hours, for the duration of the order

(3) A provider of wire or electronic communications service, landlord, custodian, or other person who furnishes facilities or technical assistance under this section shall be reasonably compensated for reasonable expenses incurred in providing the facilities and assistance

(4) A cause of action does not lie in any court against the provider of wire or electronic communications service, its officers, employees, agents, or other specified persons, for providing information, facilities, or assistance in accordance with the terms of a court order under this chapter

(5) A good faith reliance on a court order, a legislative authorization, or a statutory authorization, is a complete defense against any civil or criminal action brought under this chapter or any other law 1988

CHAPTER 23b

ACCESS TO ELECTRONIC COMMUNICATIONS

77-23b-1. Definitions.

(1) Terms used in this chapter and defined in Section 77-23a-3 have the definitions given in that section

(2) As used in this chapter, the term "remote computing service" means provision to the public of computer storage or processing services by means of an electronic communications system. 1988

SECTION II

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR WEBER COUNT, STATE OF UTAH

STATE OF UTAH, EXPARTE,	)	APPLICATION FOR AN EXPARTE ORDER
IN THE MATTER OF:	)	AUTHORIZING THE INTERCEPTION OF WIRE
TELEPHONE NUMBER (801) 731-4739 LISTED TO SHERRY BLIVEN	)	(TELEPHONIC) COMMUNICATIONS TO AND
AT THE ADDRESS OF 1096 NO. 5900 W. WEST WARREN, UTAH	)	FROM TELEPHONE NUMBER (801) 731-4739
BILLED TO: SHERRY BLIVEN	)	
AT THE ADDRESS OF 1096 NO. 5900 W. WEST WARREN, UTAH	)	

Comes now Donald C. Hughes, Weber County Attorney, being duly sworn, deposes and says:

That he, Donald C. Hughes, is the County Attorney for Weber County, State of Utah.

That he, Donald C. Hughes, has read the sworn Affidavit which is hereby incorporated by reference of Glen M. Warner, a peace officer with Ogden City Police Department, State of Utah, and that he is known to him to be a sworn peace officer in the State of Utah.

That he, Donald C. Hughes, has read the Application for an Exparte Order authorizing interception of wire (telephonic) communication on telephone number (801) 731-4739, and the accompanying sworn Affidavit of Glen M. Warner in connection with that Application, and the Exparte Order authorizing the interception of wire (telephonic) communications on (801) 731-4739, all of which are listed in the incorporated Affidavit and incorporated into this Application.

That he, Donald C. Hughes, believes the information contained in this Application, including the documents referred to in Paragraph (2) of this Application, indicate that crimes involving illegal drugs, to wit: violations of Utah Controlled Substance Act, Section 58-37-8, Utah Code Annotated, 1953 as Amended, and the Law of Conspiracy to violate the Controlled Substance Act in violation of Section 76-4-201, Utah Code Annotated, 1953 as Amended, and the soliciting, requesting, commanding, encouraging, or intentionally aiding the commission of the above enumerated crimes in violation of Section 76-2-202, Utah Code Annotated, 1953 as Amended, involving the possession of controlled substances with intent to distribute, to wit: cocaine; the conspiracy to commit these offenses and soliciting, requesting, commanding, encouraging, or intentionally aiding the commission of these offenses, all of which are felonies, punishable by more than one year in the Utah State Prison, have been committed, are being committed, and will be committed in the future.

That he, Donald C. Hughes, based upon the foregoing, believes that evidence of the heretofore mentioned crimes may be obtained by interception of wire (telephonic) communication and interception of such communications pursuant to Section 77-23a-10 Utah Code Annotated, 1953 as Amended, and Title III of Public Law 90-351 U. S. Code.

That the communications to be intercepted are telephone conversations held over the telephone bearing the number (801) 731-4739, located at the residence at 1096 No. 5900 W., West Warren, Weber County, Utah, which is a single family, rambler style, dwelling located in an agricultural area of Weber County, Utah and listed to and billed to Sherry Bliven.

That other investigative techniques, as set out in detail in the accompanying Affidavit and incorporated herein, have been tried and failed or resonably

appear to be unlikely to succeed if tried or too dangerous.

That the authorization to intercept these wire (telephonic) communications be permitted for a period of thirty(30) days, twenty-four (24) hours a day, and not to terminate upon the initial interception of incriminating conversations of David J. Hunt and other co-conspiritors, and others known and as yet unknown or unidentified who are selling them or applying them or are buying from them or being supplied by them controlled substances, to wit: cocaine.

Based upon the facts contained in the sworn Affidavit of Glen M. Warner, incorporated fully herein by reference, there is probable cause to believe that this is a continuing, ongoing, criminal conspiracy engaged in the distribution and purchase of controlled substances, to wit: cocaine, and that additional communications of the same type sought to be intercepted will occur after the sought after communications have been first obtained.

That no previous applications to intercept communications involving the telephone referred to herein have been made or issued.

Further, that in order to aid in reaching the objectives or the applied for Order, and to aid in minimizing the interception of communications not authorized to be intercepted, your applicant requests that that Order authorize both the installation of a Pen Register (number dialed recorder) on the communications facilities designated in the supporting Affidavits in order to locate and identify other communications facilities associated with outgoing telephone calls, and toll record information pertaining to telephone number (801) 731-4739 listed to Sherry Bliven, located at 1096 No. 5900 W., West Warren, Weber County, Utah.

Therefore, it is specifically requested that Mountain States Telephone and Telegraph Company be directed to furnish Ogden City Police Department all

information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such company is according to the person or persons whose communications are to be intercepted.

WEBER COUNTY ATTORNEY

STATE OF UTAH)
) SS.
COUNTY OF WEBER)

The above person Dave H. C. Hughes personally appeared before me, and subscribed and sworn here to this 26th day of July, 1986, by Judy Horvat.

Judy Horvat
NOTARY PUBLIC

My commission expires:
2/12/87

DONALD C. HUGHES
Weber County Attorney
7th Floor Municipal Bldg.
Ogden, Utah 84401
(801) 399-8377

SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

State of Utah, Exparte IN THE MATTER OF: TELEPHONE NUMBER (801) 731-4739 LISTED TO SHERRY BLIVEN AT THE ADDRESS OF 1096 N. 5900 W., WEST WARREN, UTAH.	MOTION NUNC PRO TUNC Case No. _____

COMES NOW, Donald C. Hughes, Jr., Weber County Attorney, and moves the Court for an order Nunc Pro Tunc. It appears that the original application in the above-entitled matter upon which the Court granted the original intercept order, was not fully executed. The document was prepared and reviewed under my direction. I conversed with the Honorable John F. Wahlquist concerning our support for the intercept and in conjunction with Sergeant Glen M. Warner, the affiant in all of the supporting affidavits presented the application to Judge Wahlquist to secure the order. I fully approved the application in its final form, but due to a clerical oversight the final draft accompanying the Judge's order was not executed.

THEREFORE, it is hereby moved that the original document now be executed by myself with its effect Nunc Pro Tunc.

DATED this 26th day of July, 1986.

DONALD C. HUGHES, JR.
Weber County Attorney

ORDER

Upon the reading of the Motion of Donald C. Hughes, Jr., and good cause appearing,

IT IS HEREBY ORDERED that Donald C. Hughes, Jr., execute the original Application forthwith to have been effective Nunc Pro Tunc to May 23, 1986 at 1209 hours.

DATED this 26th day of July, 1986.

JOHN F. WAHLQUIST
District Court Judge

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,	)	
	)	
Plaintiff and Respondent,	)	ORDER
	)	
v.	)	Case No. 880386-CA
	)	
David J. Hunt,	)	
	)	
Defendant and Appellant.	)	

Before Judges Orme, Garff and Davidson (On Law and Motion).

This matter is before the court on appellant's Application for Continuation of a Certificate of Probable Cause, which was transferred from the Utah Supreme Court on November 6, 1989.

IT IS HEREBY ORDERED THAT the remittitur issued by this court on October 30, 1989 is recalled as improvidently granted under the circumstances of this case, and

IT IS FURTHER ORDERED THAT the remittitur shall be stayed up to and including December 4, 1989, which is the period allowed by the Utah Supreme Court for filing of a Petition for Writ of Certiorari in this case, and

IT IS FURTHER ORDERED THAT a further stay of the remittitur shall be in accordance with the terms of R. Utah Ct. App. 36(c) providing for stay pending disposition of a petition for writ of certiorari.

DATED this 15th day of November, 1989.

FOR THE COURT:

Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on 16, November 1989 I mailed a true and correct copy of the foregoing ORDER by depositing the same with the United States Mail, postage prepaid to the following:

Randine Salerno
Attorney for Appellant
2568 Washington Blvd., #205
Ogden, UT 84401

R. Paul Van Dam
Attorney General
Dan R. Larsen
Assistant Attorney General
B U I L D I N G M A I L

Honorable David E. Roth
Second District Court
2549 Washington Blvd.
Ogden, UT 84401

Second District Court
Court Clerk
2549 Washington Blvd.
Ogden, UT 84401

Case No. 17750

DATED this 16th day of November, 1989.

By Kathleen Flynn
Kathleen Flynn
Deputy Court Clerk

SECTION II

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR WEBER COUNTY, STATE OF UTAH

STATE OF UTAT, EXPARTE;	)	APPLICATION FOR AN EXPARTE ORDER
IN THE MATTER OF:	)	AUTHORIZING THE EXTENSION OF THE
TELEPHONE NUMBER (801) 731-4739	)	INTERCEPTION OF WIRE
LISTED TO SHERRY BLIVEN		(TELEPHONIC)
AT THE ADDRESS OF 1096 NO. 5900 W. West Warren, Utah	)	COMMUNICATIONS TO AND FROM TELEPHONE NUMBER
BILLED TO: SHERRY BLIVEN		(801) 731-4739
AT THE ADDRESS OF 1096 No. 5900 W. West Warren, Utah	)	

Comes now William F. Daines, a duly authorized deputy Weber Co. attorney, being duly sworn, deposes and says:

that he, William F. Daines, is a deputy County Attorney for Weber County, State of Utah. That he, William F. Daines has read the sworn affidavit which is hereby incorporated by reference of Glen M. Warner, a peace officer with Ogden City Police Department State of Utah, and that he is known to him to be a sworn peace officer in the State of Utah.

That he, William F. Daines, has read the Application for an Exparte Order authorizing interception of wire (telephonic) communication on telephone number (801) 731-4739, and the accompanying sworn affidavit of Glen M. Warner in connection with that Application, and the exparte order authorizing the interception of wire (telephonic) communications on (801)731-4739, all of which are listed in the incorporated Affidavit and incorporated into the Application.

That he, William F. Daines, believes the information in this Application, including the documents referred to in paragraph (2) of this Application, indicate that crimes involving illelal drugs, to wit: violations of Utah Controlled Substance Act, Section

58-37-8, Utah Code Annotated. 1953 as Amended, and the Law of Conspiracy to violate the Controlled Substance Act in violation of Section 76-4-201, Utah Code Annotated, 1953 AS AMENDED, and the soliciting, requesting, commanding, encouraging ot intentionally aiding the comission of the above enumerated crimes in violation of Section 76-2-202, Utah Code Annotated, 1953 as Amended, involving the possession of controlled substances with intent to distribute, to wit: cocaine; the conspiracy to comit these offenses and soliciting, requesting, commanding, encouraging or intentionally aiding the commission of these offenses, all of which are felonies, punishable by more htan one year in the Utah State Prison, have been committed, are being committed, and will be committed in the future.

That he, William F. Daines, based upon the foregoing, believes that evidence of the heretofore mentioned crimes may be obtained by interception of wire (telephonic) communication and interception of such communications pursuant to Section 77-23a-10 Utah Code Annotated, 1953 as Amended, and Title III of Public Law 90-351 U.S. Code.

That the communications to be intercepted are telephone conversations held over the telephone bearing the number 801 731-4739, located at the residence at 1096N 5900 W. West Warren, Weber County, Utah, which is a single fanily, rambler style, dwelling located in an agricultural area of Weber County, Utah and listed to and billed to Sherry Bliven.

That other investigative techniques, as set out in detail in the accompanying Affidavit and incorporated herein, have been tried and failed or reasonably appear to be unlikely to succeed if tried or too dangerous.

That the authorization to intercept these wire (telephonic) communications be permitted for a period of thirty (30) days, twenty four (24) hours a day and not to terminate upon the initial interception of incriminating converstiaons

of David J. Hunt and other co-conspiritors, and others known and as yet unknown or unidentified who are selling them or applying them or are buying from them or being supplied by them controlled substances, to wit: cocaine.

Based upon the facts contained in the sworn affidavit of Glen M. Warner,incorporated fully herein by reference, there is probable cause to believe that this is a continuing, ongoing, criminal conspiracy engaged in the distribution and purchase of controlled substances, to wit: cocaine, and that additionalcommunications of the same type sought to be intercepted will occur after thesought after communicatior have been first obtained.

The previous application for interception of telephonic communications is the one for which an order was granted on May 23, 1986, to become effective May 29, 1986. This application is for an order extending that granted application.

No other applications are known to your affiant.

A statement setting forth the results thus far obtained from the original interception are found in the affidavit for extension, which is incorporated herein.

Further, that in order to aid in reaching the objectives of the applied for order, and to aid in minimizing the interception of communications not authorized to be intercepted, your applicant requests that that order authorize both the installation of a pen register (number dialed recorder) on the communications facilities designated in the supporting Affidavits in order to locate and identify other communications facilities associated with outgoing telephone calls, and toll record information pertaining to telephone number (801) 731-4739 listed to Sherry Bliven, located at 1096N 5900 W., West Warren, Weber County, Utah

Therefore, it is specifically requested that Mountain States Telephone and telegraph Company be directed to furnish Ogden City Police Department all information, facilities, and technical assistance necessary to accomplish the interception.

unobtrusively and with a minimum of interference with the services that such company is according to the person or persons whose communications are to be intercepted.

William F. Daines
DEPUTY WEBER COUNTY ATTORNEY

STATE OF UTAH)
) SS.
COUNTY OF WEBER)

The above person William F. Daines personally appeared before me, and subscribed and sworn to this 27th day of June, 1986, by Arlene L. Trujillo.

Arlene L. Trujillo
NOTARY PUBLIC

My commission expires:

Nov 1, 1987